87-634

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CHARLES V. MEADOWS and GEORGE HARRIS,
Plaintiffs and Cross-Petitioners,

VS.

THE DOMINICAN REPUBLIC and INSTITUTO DE AUXILIOS Y VIVIENDAS,
Defendants and Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit erred in determining that defendants' motion for relief from a default judgment under Rule 60(b) of the Federal Rules of Civil Procedure was "timely."

LIST OF PARTIES

Plaintiffs and Cross-Petitioners are Charles V. Meadows and George Harris, both individual United States citizens. Mr. Meadows is now deceased. Defendants and Cross-Respondents are a foreign state, the Dominican Republic, and its agency, the Instituto de Auxilios y Viviendas.

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Cross-Petitioners (plaintiffs below) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Ninth Circuit on the issue of timeliness of Cross-Respondents' (defendants below) Rule 60(b) motion in the event that Cross-Respondents' Writ of Certiorari (Docket No. 87-454) is also granted. A ruling adverse to defendants on the timeliness issue would effectively moot review of all other issues raised in defendants' Petition for Writ of Certiorari, thereby promoting judicial economy.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported in Meadows v. Dominican Republic, 817 F.2d 517 (9th Cir. 1987). It is contained in the Appendix at 1. The Ninth Circuit's Order denying defendants' Petition for Rehearing and Suggestion of Rehearing En Banc is unreported. It is in the Appendix at 73.

The decision of the District Court giving rise to the instant proceedings is reported in Meadows v. Dominican Republic, 628 F.Supp. 599 (N.D.Cal. 1986). It is in the Appendix at 29. The District Court's Order denying defendants' Motion for Reconsideration (February 25, 1986) is unreported and in the Appendix at 72.

JURISDICTION

Defendants' filed a Petition for Writ of Certiorari on September 18, 1987 (Docket No. 87-454). Both plaintiffs' and defendants' Petitions arise from the same controversy and same case decisions.

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 14, 1987 affirming the decision of the United States District Court for the Northern District of California, dated February 5, 1986. Defendants' Petition for Rehearing and Suggestion of Rehearing En Banc was denied on July 30, 1987.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Plaintiffs received Defendants' Petition for Writ of Certiorari on September 18, 1987.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 et seq., and Rule 60(b) of the Federal Rules of Civil Procedure. These provisions are set forth in the Appendix at 75-101.

STATEMENT OF THE CASE

The Parties

The defendants are a foreign state, the Dominican Republic (hereinafter "D.R.") and its agency, the Instituto De Auxilios Y Viviendas (hereinafter "Meadows") and George Harris (hereinafter "Harris"), both U.S. citizens. Charles Meadows was diagnosed as a victim of cancer in 1983 and is now deceased.

Plaintiffs' Prelitigation Dealings With The Defendants

The following facts are taken from the Declaration of Charles Meadows, filed December 11, 1981. (ER 381 CR 21) Meadows had engaged in international trade for over 20 years and made numerous business trips to the D.R. prior to filing suit. In August of 1976, he learned that the Instituto had been

trying without success to obtain a loan of 12 million dollars.

Meadows wrote to Dr. Mario A. Fernandez Mena (hereinafter "Mena"), whom Meadows understood to be the Dominican Republic's Secretary of State and General Administrator of the Instituto, and offered to locate a lender if repayment would be guaranteed by the Banco de Reservas, the Central Bank. Co-plaintiff Harris had previously informed Meadows that the guarantee would be a necessary condition before the loan could be funded through his banking contacts in London.

Mena phoned Meadows in California almost immediately, requesting urgently that Meadows locate a lender. After numerous phone conversations, during which Mena disclosed that the D.R.'s president had given top priority to the project, Mena asked Meadows to locate the

funding and agreed that a commission of two percent would be paid to Meadows if he was successful.

Consequently, Harris and Meadows contacted a lender agent in London. On September 6, 1976, after Meadows informed Mena of the preliminary general terms and conditions for the loan, Mena issued a mandate to Harris and Meadows for the loan application. (ER 371-76 CR 21) The mandate was recorded in the United States consulate's office in the D.R. and copies were received by Harris and Meadows. The loan was eventually funded by Citibank, an American bank, through Nassau and its branch in Santo Domingo.

In a phone conversation in February, 1977, Mena thanked Meadows for arranging the funding of the loan, and stated that the loan proceeds had arrived satisfactorily. Mena acknowledged that Meadows'

commission of $240,000 was due and owing, and promised to take care of it shortly.

Harris thereafter called Mr. Collins, an officer of the Citibank in Nassau, Bahamas, who acknowledged that he was aware of the commission owed and stated that it was in a floating account in New York. Collins promised that he would call New York and find out exactly where the money was located. Two weeks later, Collins called Harris to inform him that his superiors did not want him to give out any information on the loan and that if he did so, he would be transferred to the Venezuela office, apparently, not a desirable post. Collins then recommended that Harris talk to Pete Culbertson, manager of Citibank, Santo Domingo.

Meadows phoned Culbertson but he was not available. Meadows then spoke to Culbertson's assistant, Antonio Alma.

Alma stated that he did not know where the commission was located but would investigate and call back. He further advised that the final loan agreements between Citibank and the D.R. had been prepared at his Bank prior to the meeting in Nassau wherein the funds were turned over. Alma stated that the President of the D.R.'s Central Bank, the Banco de Reservas, Mena, and himself, all traveled to Nassau to assist in consummating the loan. Alma never called back as promised.

Meadows phoned Culbertson again the next day but was told that Culbertson was out of the office. Finally, by using a fictitious calling name, Meadows got Culbertson on the phone. Upon learning Meadows' identity, Culbertson stated that Meadows was to leave him alone and hung up. Meadows then called Alma who stated

that he was unable to give any further information for fear of losing his job.

During a subsequent trip to Santo Domingo, Meadows brought up the lost commission with the President of the D.R., He immediately summoned his secretary and dictated a letter to Petit regarding the matter. Two days later, Meadows received a call from the President's office asking if he would be willing to accept the commission payable in Dominican pesos. Meadows stated that he would be willing to accept payment in that currency. The next day Meadows returned to Banco de Reservas for payment but was informed that Petit and the President would be away for about two weeks. There was no authorization at the bank to pay Meadows.

Meadows went to Mena's office, who was not in. Mena's secretary informed

Meadows that he would never see the commission. The files showed that it had already been spent. She informed Meadows that $180,000 had been paid to cover late interest charges from a previous loan from Citibank and someone else had been authorized to withdraw the remaining balance of $60,000. Neither Meadows nor Harris ever received a penny of their commission.

Meadows later received an official letter from Mena stating that the $12,000,000 loan had been consummated satisfactorily in Nassau and that the D.R. government wanted him to assist in securing another loan of $20,000,000 on behalf of the Instituto. (ER 378-79 CR 21) Meadows phoned Mena to complain about the commission owed. Mena reaffirmed that it was owed to Meadows and suggested that Meadows might get a larger

commission on the $20,000,000 loan if it went through. Meadows, however, insisted he be paid for the prior loan.

The Plaintiffs' Litigation Efforts In The D.R.

The following facts are taken from the second affidavit of Charles Meadows. (ER 424 CR 31) In 1980, Meadows visited a law firm in the D.R. He discussed with several D.R. lawyers his problems in collecting the commission. He was told that no attorney in the D.R. would be willing to handle the case for fear of political repercussions. Later, Meadows called a friend who worked for the D.R. government and was told that it would not be in Meadow's "best interest" to return to the D.R. due to the controversy concerning the commission.

In the fall of 1980, plaintiffs' current counsel, E.O.C. Ord, traveled to

the D.R. and spoke personally with an attorney at the Instituto. (ER 577 CR 68) The attorney stated, without explanation, that the commission would not be paid and refused to provide any facts which would discredit Meadows' and Harris' claim to the commission.

The Plaintiffs' Efforts Through This Suit

Meadows and Harris filed suit on December 29, 1980 against the D.R. and the Instituto for breach of agreements. On February 11, 1981, the Clerk of the District Court witnessed mailing of a summons and complaint (and translations thereof) and a cover letter requesting service of these items upon the D.R. These same witnessed items were sent by certified mail with return receipt requested to Mena. The mailing receipt was never returned.

On April 28, 1981, the Clerk of the District court witnessed a second mailing of the summons, and related materials, including a copy of the Foreign Sovereign Immunities Act ("FSIA"), to the Head of the Ministry of Foreign Affairs of the D.R. and a separate mailing to the Administrator General of the Instituto. (CR 8) The mailing receipts were never returned.

On June 17, 1981, the Clerk of the District Court witnessed the mailing of a letter to the State Department requesting service of the summons, complaint and notice of suit (and translations thereof) upon the D.R. (CR 13) On October 1, 1981, the Clerk of the District Court received a letter from the United States Department of State (CR 15) That letter informed the Court that the DR had been served on September 10, 1981, with the

summons, complaint, notice of suit, and copies of the FSIA as requested.

The U.S. Embassy's note of transmittal, served upon the defendants with plaintiffs' notice of suit, summons, complaint, and copy of the FSIA stated:

> Under applicable United States law a defendant in a lawsuit must file an answer to the complaint or some other responsive pleading within sixty days form the date of service of the complaint (i.e., the date of this note) or face the possibility of having judgment entered against it without the opportunity of presenting evidence or arguments in its behalf. Accordingly, the embassy requests that the enclosed nonresident citation and plaintiff's first amendment original petition be forwarded to the appropriate authority of the Government of the Dominican Republic with a view towards taking whatever steps are necessary to avoid a default judgment.
>
> ... Under the laws of the United States, any jurisdictional or other immunity must be addressed to the Court before which the matter is pending, for which reason it is advisable to consult an attorney in the United States.

> ... The notice of suit includes a copy of pertinent United States laws concerning sovereign immunities. For your information, we are enclosing a copy of the text of the Secretary of State's Circular Diplomatic Note of December 10, 1976 alerting foreign missions in Washington to the substance of the Act and its implementation and impact.

(CR 15, 60, Exhibit A therein. Emphasis added.)

The Circular which was attached to the notice of transmittal delivered to the defendants stated in part:

> In addition to questions of state immunity, the new legislation will also prescribe the jurisdiction of Federal courts in the United States over foreign states and their agencies and instrumentalities ...
>
> The new statute precludes the Department of State from making decisions on state immunity. Such decisions must be made exclusively by the courts. Thus, when the legislation takes effect on January 29, 1977, the Department will not be able to continue its prior practice of entertaining diplomatic requests to determine questions of sovereign immunity, or of conveying such

> determinations of immunity to an American Court. ...

(State Dept. File No. P77 0014-208. 1976 Digest of U.S. Practice in Intern. Law 327-328. Emphasis added.) The defendants, however, did not respond.

Default was entered by the Clerk against the defendants on November 16, 1981. (CR 16,17) The plaintiffs then moved for entrance of a default judgment. (CR 19,21,30) Plaintiffs established their right to relief as required by 28 U.S.C. §1608 (a)(3) before the default judgment was entered. (ER 381,424 CR 21, 30) Plaintiffs' motion and supporting documents were mailed to the defendants at the same two separate addresses. (See Certificate of Mailing, CR 21)

The Jurisdictional Proceedings

On April 6, 1982, the District Court, on its own motion, dismissed the

plaintiffs' complaint. (CR 22,23) The Order stated that the plaintiffs failed to plead sufficient facts to establish the traditional state diversity of citizenship minimum contacts for personal jurisdiction. (CR 22) On May 26, 1982, the Ninth Circuit Court denied the plaintiffs' motion for reconsideration. (CR 26,27,32)

On August 11, 1982, plaintiffs appealed to the Ninth Circuit Court of Appeals. (CR 37) On January 17, 1984, that court remanded the case to the District Court to permit plaintiffs "to file an amended complaint or to secure the entry of a final judgment." (CR 40) All briefs were mailed to the petitioners at their two separate addresses.

On remand, the District Court did not disagree and entered a second default judgment against defendants on June 1,

1984. (CR 48,50) Plaintiffs' Memorandum in Support of Interest, the proposed judgment, a letter to the District Court regarding interest, and the Court's direction to file a proposed judgment, were all mailed to the defendants on May 24, 1984. (CR 49)

Serving the Default Judgment

The default judgment signed by the District Court was mailed to plaintiffs' counsel's former address and returned to the court. After plaintiffs' receipt of the judgment, a copy was sent by registered mail return receipt requested to the defendants on September 4, 1984. Through an oversight, an unsigned copy of the judgment was enclosed. Also enclosed, however, was a conformed copy via a translation of the judgment into Spanish, indicating that the judgment was signed by the Court and a cover letter stating

that a file stamped copy of the judgment was enclosed. Defendants have admitted that the September 4th mailing was received. (CR 60 at para.8)

On February 15, 1985, a copy of the signed default judgment and a Notice of Default (and translations thereof) were once again mailed to the defendants, registered mail, return receipt requested. On March 8, 1985, pursuant to the plaintiffs request to the Department of State, the United States Embassy served the default judgment on the D.R. On April 2, 1985, the Instituto, for the first time ever, returned a mailing receipt (from the February 15, 1985 mailing).

On April 10, 1985, the defendants, purporting to make a special appearance through a single counsel, moved to vacate entry of the default. The defendants

admitted having received the U.S. Embassy's original transmittal of the complaint but offered the opinion of Fabiola Medina Garnes (hereinafter "Garnes"), the current Assistant to the Legal Counsel to the President of the D.R., that the defendants did not respond to the service on the advice of Pedro Padilla Tonos, the Undersecretary and Acting Secretary of Foreign Affairs at the time of the U.S. Embassy's service. (CR 60 para.4) Garnes stated that she had reviewed all the files of the various parties on the matter. (CR 60, para.2) Despite the fact that Tonos was professor of international law and was a delegate to the United Nations in the U.S. during the time the FSIA was being considered in Congress (Exhibit A herein. CR 72, Declaration of Miles Davidson), Garnes

speculated that Tonos was unaware of the FSIA. (CR 60, para.4)

The defendants offered a governmental memorandum allegedly written by Tonos on December 5, 1981. The defendants' copy does not show a signature and there was no statement by Tonos verifying the document's authenticity. The memo stated in part:

> "We are hereby sending you a copy of Note No. 92 and its enclosures, dated September 8, 1981, from the Embassy of the United States of America, ...That was returned to the Embassy of that country together with its accomplished enclosures.
>
> The devolution of the above mentioned documents was made by the chancellorship in order to avoid any implied approval either of the terms of the Note nor if its enclosures based on the principle of immunities of the jurisdiction of the State of the Public International Law.
>
> In complying with the empowering of this Secretariat of States to the Attorney General's Office of the Republic, it has been taken into account the duly procedure to that competent jurisdiction. At the same

> time, this case has been informed to the President of the Republic, Mr. Antonio Guzman."

(CR 60, Exhibit therein. Emphasis added)

The U.S. State Department, in a letter to plaintiffs' counsel dated July 3, 1985, however, provided contradictory and additional facts:

> The Secretariat of State for Foreign Relation replied via diplomatic on November 2, 1981 to our September 8 diplomatic transmittal note. In its note the Dominican Government sought to claim jurisdictional immunity as a foreign state. Though the note stated that the documents served with the September 8 note were being returned, the Embassy reported that they did not accompany the diplomatic note.
>
> In response to the November 2 note, the American Embassy in Santo Domingo consulted with the Secretariat of Foreign Relations on November 25, 1981 for the purpose of emphasizing the importance of addressing the Dominican Republican's response to the lawsuit to the U.S. District Court rather than the Department of State.

(ER 149-50 CR 72, Item 3 therein)

In their reply papers, defendants' explanation changed. They offered a declaration of Tonos declining responsibility for the decision not to respond to the suit. (ER 269 CR 71, Appendix D therein) Defendants then offered an anonymous unauthenticated memorandum purporting to convey an opinion of the Advisory/Consulting Commission that "it [the D.R.] should not appear nor be represented..." (ER 271 CR 71, Appendix C therein) The opinion and legal reasoning were nowhere provided.

On February 5, 1986 the District Court denied the defendants' motion for Rule 60(b) relief. (App.29) At the hearing, for the first time, plaintiffs raised the issue of a separate entity. The District Court ruled that it was too late to raise the issue and instructed plaintiffs not to provide anything

further on the matter. Meadows, 628 F.Supp. at 608. (App.63) After the District Court denied the defendants' motion for reconsideration on February 25, 1986, (App.72), defendants appealed to the Ninth Circuit Court of Appeals on March 4, 1986. Plaintiffs cross-appealed on March 19, 1986. On May 14, 1987, the Ninth Circuit affirmed the lower court decision. (App.1) Defendants' subsequent motion for rehearing and suggestion of rehearing en banc was also denied on July 30, 1987. (App.73)

REASONS FOR GRANTING THE WRIT

Both plaintiffs' and defendants' Petitions arise from the same controversy and arise out of the same case decisions. The granting of defendants' Petition (Docket No. 87-454) should be conditioned upon the granting of plaintiffs' Petition

as resolution of the timeliness of defendants' Rule 60(b) motion, and the timeliness of the separate entity issues raised in this Petition, could dispose of defendants' arguments. Indeed, a resolution adverse to defendants on the timeliness issue would necessarily moot defendants' entire Petition currently pending before this Court without the necessity of the Court deciding defendants' appeal on the merits. Should, however, the defendants petition for certiorari be denied, the undersigned requests that Plaintiffs' Petition likewise be denied, as this issue would then be moot.

Finally, the circuits are in conflict as to what is timely.

I. THE NINTH CIRCUIT'S EXERCISE OF DIRECTION HERE WAS CLEARLY ERRONEOUS AND DEFENDANTS MOTION TO SET ASIDE THE DEFAULT JUDGMENT UNDER RULE 60(b) SHOULD HAVE BEEN DENIED AS UNTIMELY. IT CONFLICTS WITH ITS OWN PRECEDENT AND THAT OF OTHER CIRCUITS.

Defendants' motion to set aside the default judgment for excusable neglect under Rule 60(b)(1) should have been denied because it was untimely. In not doing so, the Ninth Circuit committed reversible error.

Rule 60(b) provides in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) . . . excusable neglect; . . .(4) the judgment is void; . . . . The motion shall be made within a reasonable time, and for reasons, (1), (2), and (3) not more than one year after the judgment, . . . was entered . . . . (emphasis added).

(App.99)

A motion to vacate a default judgment for excusable neglect pursuant to Fed.R.Civ.P. 60(b)(1) must be made within one year. Fed.R.Civ.P. 60(b). Such a motion may be denied although it was filed within the one year period if the court finds that the defendant was guilty of laches or unreasonable delay. J. Moore & J.D. Lucas, Moore's Federal Practice, ¶ 60.22[4] (2d ed. 1985); Amoco Overseas Oil v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 656 (2d Cir. 1979); Mayfair Extension, Inc. v. Magee, 241 F.2d 453, 454 (D.C. Cir. 1957).

The one-year period is only a maximum term. See Wright & Miller, 11 Federal Practice and Procedure, §2866 at 232 (1973); Amoco Overseas Oil v. Compagnie National Algerienne, 605 F.2d 648, 656 (2d Cir. 1979); Mayfair

Extension, Inc. v. Magee, 241 F.2d 453 (CA D.C. 1957). Courts have not hesitated to deny an untimely Rule 60(b) motion. See e.g. Yanow v. Weyerhauser Steamship Co., 274 F.2d 274, 281 (9th Cir. 1959), (delay of eleven months after the date of the original decision before the filing of a motion was unreasonable); Stafford v. Russell, 220 F.2d 853, 254 (9th Cir. 1955) (eight-month delay was unreasonable); Security Mut. Cas. Co. v. Century Case. Co., 621 F.2d 1062 (10th Cir. 1980) (a delay of 115 days not reasonable); also see American Metals Service Airport v. Ahrens, 666 F.2d 718, 721 (1st Cir. 1981) ("unexcused delay [of five months] alone is an adequate basis for affirming" denial of Rule 60(b) relief).

In exercising its discretion in granting or denying a Rule 60(b) motion,

Courts should not be swayed by the fact that the parties seeking relief are a foreign state and its agency. Congress has expressly provided that in such cases, a "Foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." FSIA, 28 U.S.C. §1606.

Here, the Ninth Circuit and the District Court concluded that defendants' motion to set aside the default under Rule 60(b)(1) was timely filed because less than one year had elapsed from entry of the judgment and no attempt had been made by plaintiffs to execute on the judgment. See Meadows, 817 F.2d at 521 (App. 12); Meadows, 628 F.Supp. at 608 (App.65). However, under the collection provisions, plaintiffs could not collect on the judgment due to the special prohibitions of section 1610(c) of the

Foreign Sovereign Immunities Act. (App.95)

Under that section, execution or attachment under 28 U.S.C. §1610 is not allowable until a reasonable period of time has elapsed following entry of judgment and giving of notice. Here, conclusive notice could not be established by plaintiffs until the return on the Secretary of State's service on March 8, 1985 due to defendants' willful failure to return any of the mailing receipts. Consequently, plaintiffs had little time to engage in collection prior to the filing of defendants' motion on April 2, 1985. The delay in collection activity, a factor considered by both the Ninth Circuit and District Court, was due not to the inactivity of the plaintiffs, but rather to the continual willful misconduct in withholding the mailing

receipts as they had done since institution of the suit and other delaying tactics of defendants, and the required waiting time of Section 1610.

Furthermore, the Ninth Circuit has held that the timeliness of collection efforts by a plaintiff is not a proper criterion in determining whether a Rule 60(b) motion is timely. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). Under Ashford, defendants' motion should have been denied on the basis of timeliness and the Ninth Circuit's exercise of discretion here was clearly erroneous.

Instead of taking prompt action in May and September 1984 and February 1985 when defendants received notice of the proposed default judgment, defendants sat idle for close to eleven months, willfully refusing to return mailing

receipts. Indeed, it wasn't until after the State Department intervened at plaintiffs' request to serve defendants a fourth copy of the default judgment, that defendants finally filed a motion for relief under Rule 60(b). This conduct is sufficiently culpable and prejudicial to the plaintiffs that defendants' motion should have been denied on timeliness grounds. Furthermore, defendants have conspicuously failed to provide admissible, credible facts sufficient to show excusable neglect under subpart (1) of Rule 60(b). All they have proferred are contradictory excuses. The motion simply was not timely.

By comparison, plaintiffs bent over backwards to serve defendants. Two addresses were consistently used for purposes of mailing notice: the D.R.'s and Instituto's. Multiple mailings were

sent. Defendants' conduct clearly evidenced an egregious pattern of willfulness and an intent to frustrate the judicial process. The motion for relief should have been denied as untimely.

Finally, even the Ninth Circuit noted in its decision that while:

> "The district court concluded that the motion ... was timely filed ... reasonable minds might differ in ruling on the timeliness of the motion." (emphasis added)

Meadows, 817 F.2d at 521 (App.12). The reference that reasonable minds might differ persuasively evidences that even the Ninth Circuit had difficulty with the district court's finding on the timeliness issue. As the foregoing facts demonstrate, however, reasonable minds could not differ on this issue. Defendants motion was not filed within a reasonable time and therefore should have been denied as untimely.

A ruling by this Court that defendants' 60(b) motion was untimely would effectively moot all the issues raised in defendants' Petition for Writ of Certiorari. This Court should therefore grant review to defendants' Petition if review is also granted to plaintiffs, and visa versa. Should, however, the defendants' petition for certiorari be denied, the undersigned requests that the current petition likewise be denied as the timeliness issue would be moot.

Finally, as previously noted, the Ninth Circuit and the District Court, in considering defendants' motion as timely, took into consideration the fact that less than one year had elapsed from the entry of judgment and that plaintiffs had not yet exercised collection efforts. However, the Ninth Circuit held in Ashford, supra, that the collection

efforts by a plaintiff is not a proper criterion in determining timeliness. Thus, this fact clearly should not have been given any weight. If this factor is properly disregarded, then the decisions rest solely on the mere fact that the motion was filed within one year, thereby effectively creating a rubber-stamp finding of timeliness.

The one year term, however, is only a maximum period, and other circuits have not hesitated in finding a motion unreasonable and untimely although filed within one year. See e.g. Central Operating Co. v. Utility Workers of America, 491 F.2d 245, 252-53 (4th Cir. 1974) (affirming denial of relief under the Rule 60(b)(1); Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062 (10th Cir. 1980) (delay of 115 days not reasonable and untimely); American Metals

Service Airport v. Ahrens, 666 F.2d 718 (1st Cir. 1981) (five month delay sufficient to deny. Consequently, the Ninth Circuit's finding on the timeliness of defendant's motion here is in conflict with other circuits.

CONCLUSION

For all the foregoing reasons, including the expressed caveates, Plaintiffs' Cross-Petition for Writ of Certiorari should be granted. Further, in the event that the timeliness of the raising of the separate entity defense is also an issue that should be petitioned, Plaintiffs hereby petition it herein. The discussion of this issue is covered in our reply to the petition of the defendants in the lower court. This petition should also be deemed to cover the issue of whether the petitioners

offered competent evidence of a meritorious defense that a Court can consider. This is also discussed in our reply brief.

Respectfully submitted,

_____
E.O.C. ORD
Attorney for Cross-Petitioners

Dated: October _____, 1987

08:CP

No. _____

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OF THE

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APPENDIX TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Federal Rules of Civil Procedure Rule 60(b)	A-99

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES V. MEADOWS, GEORGE HARRIS,	)	
Plaintiffs-Appellees/ Cross-Appellants,	)	No. 86-1785 and 86-1843
v.	)	D.C. NO.
	)	CV 80-4626-WWS
THE DOMINICAN REPUBLIC; and INSTITUTO, DE AUXILIOS Y. VIVIENDAS,	)	OPINION
Defendants-Appellants/ Cross-Appellees.	)	

Argued and Submitted
January 16, 1987
San Francisco, California

Filed May 14, 1987

Before: Procter Hug, Jr. and Arthur L. Alarcon, Circuit Judges, and Albert Lee Stephens, Jr.,*/ (District Judge).

Opinion by Judge Alarcon

Appeal from the United States District Court for the Northern District of California

William W. Schwarzer, District Judge Presiding

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*/ Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

OPINION

ALARCON, Circuit Judge:

The Dominican Republic (hereinafter Republic) and the Instituto De Auxilios Y Viviendas (hereinafter Instituto or, collectively, appellants) appeal from the denial of their motion to vacate the entry of the default judgment entered against them and the denial of their motion for reconsideration. Appellants contend that the district court lacked subject matter jurisdiction to enter a default judgment in this matter because the Republic was improperly named as a defendant. They also argue that the court lacked personal jurisdiction over the Instituto. Finally, appellants assert that the court erred in concluding their default was not the result of excusable neglect. We reject each of these contentions.

PERTINENT FACTS AND PROCEDURAL HISTORY

The district court entered a default judgment based on a showing by the plaintiff Charles V. Meadows (hereinafter Meadows) that he was not paid a two percent commission owed to him for obtaining a $12 million loan for the Instituto. Meadows was requested to obtain the loan commitment by Dr. Marion A. Fernandez Mena (hereinafter Mena), the Secretary of the Republic and the General Administrator of the Instituto. Subsequently, plaintiff George Harris (hereinafter Harris or, collectively, appellees) contacted Sir Thomas Buxton, a lender in London, to obtain the money sought by Mena. Buxton advised Meadows and Harris that funding in the amount requested was available. Meadows then informed Mena of the terms and conditions for the loan.

Mena issued a mandate for the loan application to Meadows on September 6, 1976. The mandate was recorded in the Office of the Consulate of the United States. The letter referred to a two percent commission, although it did not specify to whom the commission was to be paid. The letter also did not indicate that any action other than performance was required of plaintiffs. In December 1976, the Instituto received a loan commitment for $12 million from Citibank Nassau's Santo Domingo branch on terms similar to those specified in the September mandate.

In February of 1977, Mena advised Meadows that the loan proceeds had arrived. Mena thanked Meadows for the arrangements and acknowledged that Meadows' commission of $240,000 was due and owing. Meadows and Harris then

engaged in a series of attempts by telephone to secure the commission. They received only evasions and excuses.

Thereafter Meadows received a letter from Mena stating that the money had been received on February 14, 1977, and that the Republic wanted Meadows' assistance in securing another loan of $20,000,000 on behalf of the Instituto. No reference was made to the commission due on the previous loan.

During a later telephone conversation, Mena told Meadows that he would get a larger commission if he would obtain a second loan. Meadows told Mena he would not assist in procuring a second loan until his original commission was paid. Meadows and Harris were subsequently refused payment by Citibank of New York and by the Instituto.

Meadows attempted to obtain counsel in the Republic, but was told that it would be politically unwise for a Dominican lawyer to represent him. Meadows then retained American counsel, who traveled to the Republic in 1980 in order to discuss payment of the commission with counsel for the Instituto. Payment was refused without explanation. Meadows and Harris filed an action for breach of ccntract in the District Court for the Northern District of California on December 19, 1980.

On February 11, 1981, Meadows and Harris attempted to serve the Republic and the Instituto with summons and a copy of the complaint by mail addressed to the Secretary of State of the Republic and to Mena, with return receipt requested. No return receipts were received.

On April 28, 1981, they followed the same procedure and mailed the summons and a copy of the complaint to the Head of the Ministry of Foreign Affairs of the Republic and to Mena in his capacity as the Administrator General of the Instituto. Again, no return receipts were received.

On June 17, 1981, Meadows and Harris sent a letter to the United States Department of State, witnessed by the clerk of the district court, as required by 28 U.S.C. § 1608(a)(4) requesting service on the Republic. On October 1, 1981, the United States Department of State informed the clerk of the court in writing that service had been effected on the Foreign Ministry of the Republic on September 10, 1981. The clerk was also advised that the Republic had been given detailed warnings of the legal

consequences that would result from a failure to respond to the complaint.

The Republic and the Instituto did not respond. Default was entered November 16, 1981. Thereafter, the court dismissed the complaint sua sponte for failure to allege facts sufficient to establish personal jurisdiction over the defendants. Meadows and Harris appealed to this Court. We remanded the action to the district court with instructions to permit the filing of an amended complaint. Meadows v. Dominican Republic, No. 82-4450, memorandum (9th Cir. Sept. 29, 1983).

Meadows and Harris filed affidavits in the district court on the jurisdictional issue. On June 1, 1984, a second default judgment was entered against the

Republic and the Instituto in the amount of $240,000 plus interest.

On September 4, 1984, Meadows and Harris mailed copies of the default judgment to the Republic. The Republic's Undersecretary of Foreign Affairs forwarded a copy to the Instituto. No return receipt, however, was sent back to the plaintiffs. Meadows and Harris again served notice of the judgment on the Republic and the Instituto by mail in February 1985. The United States Department of State finally served notice of the judgment on the Secretary of Foreign Services of the Republic in March 1985. A return receipt of the February 1985 mailing was eventually received from the Instituto in April 1985.

The Republic and the Instituto filed a motion to set aside the default judgment and a motion for reconsideration.

The district court found both motions to be timely, but denied them. Meadows v. Dominican Republic, 628 F.Supp. 599 (N.D.Cal. 1986). The Republic and the Instituto appealed those denials, and Meadows and Harris cross-appealed the finding of timeliness.

DISCUSSION

1. Timeliness Of Defendants' Motion To Vacate

In their cross-appeal, Meadows and Harris contend that the motion to set aside the default judgment for excusable neglect under Rule 60(b)(1)[1/] should have

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1/ Rule 60(b) provides in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) . . . excusable

(Footnote Continued)

been denied because it was untimely. A motion to vacate a default judgment for excusable neglect pursuant t Fed.R.Civ.P. 60(b)(1) must be made within one year. Fed.R.Civ.P. 60(b). Such a motion may be denied, although it was filed within the one year period, if the district court finds that the defendant was guilty of laches or unreasonable delay. 7 J. Moore & J.D. Lucas, Moore's Federal Practice, ¶ 60.22[4] (2d ed. 1985); Amoco Overseas Oil v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 656 (2d Cir. 1979); Mayfair Extension, Inc. v. Magee, 241 F.2d 453, 454 (D.C. Cir. 1957). There is no time limit

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(Footnote Continued)

neglect; . . . (4) the judgment is void; . . . . The motion shall be made within a reasonable time, and for reasons, (1),(2), and (3) not more than one year after the judgment, . . . was entered . . . .

on a Rule 60(b)(4) motion to set aside a judgment as void. 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2862, Rule 60 (1973); Bookout v. Beck, 354 F.2d 823, 825 (9th Cir. 1965).

The district court concluded that the motion to set aside the default under Rule 60(b)(1) was timely filed because less than one year had elapsed from the entry of the judgment, and no attempt had been made to execute on the judgment. While reasonable minds might differ in ruling on the timeliness of the motion, based on all the facts and circumstances in the record, the court's ruling was not unreasonable. The district court did not abuse its discretion in ruling that the motion was timely filed.

2. Denial Of Defendants' Motion To Vacate The Default Judgment

A. Standard of Review

Factual findings of the district court with respect to Rule 60(b) motions are reviewed for clear error. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co., 774 F.2d 1371, 1374 (9th Cir. 1985). If findings are undisputed or are not clearly erroneous, then the court's determination is reviewed for abuse of discretion. Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (en banc) (applying abuse of discretion standard to excusable neglect finding on a Rule 60(b)(1) motion).

We have held that we will reverse such a ruling "only upon a clear showing of abuse of discretion." Pena v. Seguros La Comercial, S.A., 770 F.2d 811,

814 (9th Cir. 1985) (adding emphasis and citing Ellis v. Bhd. of Ry., Airline & Steamship Clerks, 685 F.2d 1065, 1071 (9th Cir. 1982), aff'd in relevant part, 466 U.S. 435 (1984)). This discretion is limited by three considerations. First, since Rule 60(b) is remedial in nature, it must be liberally applied. Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974). Second, default judgments are generally disfavored and cases should be decided on their merits. Id. Third, where defendant seeks timely relief from the judgment and has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment. Id.

A district court has the discretion to deny a Rule 60(b)(1) motion, however, if (1) the defendant's culpable conduct led to the default, (2) the defendant has

no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside. Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985) (citing Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam)). If a default judgment is entered as the result of defendant's culpable conduct, however, we need not consider whether a meritorious defense was shown, or whether the plaintiff would suffer prejudice if the judgment were set aside. Id. at 815; Benny v. Pipes, 799 F.2d 489, 494 (9th Cir. 1986).

B. Culpable Conduct or Inexcusable Neglect

A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer. Pena, 770 F.2d at 815; Benny, 799 F.2d at 494. Here, the Republic and the Instituto received

actual notice of the complaint and intentionally declined to answer.

Appellants claim that their failure to answer was due to excusable neglect. They argue that they acted on the advice of counsel in failing to respond after receiving actual notice of the filing of the complaint. Appellants rely on an anonymous memorandum from an Advisory Commission stating that the Republic should not appear or be represented. The record shows that the person upon whose advice appellants originally claim to have relied, Pedro Tonos, the Republic's Undersecretary of Foreign Affairs, denied responsibility for the decision not to respond.

Furthermore, appellants were aware of relevant federal law. The district court found that defendants were fully informed of the legal consequences of

failing to respond by the United States Department of State. The district court also found that the Republic was sufficiently sophisticated and experienced in the requirements of American law to protect its interests, based on its involvement in other actions in United States courts. See, e.g., Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378-80 (5th Cir. 1980)(Dominicana Airlines, wholly owned by the Dominican Republic found to have engaged in commercial activities and therefore not protected by sovereign immunity).

Under the circumstances presented in the record, the district court did not abuse its discretion in finding that appellants' default was intentional, culpable, and inexcusable under Rule 60(b)(1). Because appellants' neglect was inexcusable, we need not

determine whether the record shows a meritorious defense or prejudice to the appellees. Pena, 770 F.2d at 815; Benny, 779 F.2d at 494.

3. The Judgment Was Not Void

The appellants further attack the judgment as void for want of jurisdiction. Whether a judgment is void is a question of law reviewable de novo on appeal. See, e.g., Redding Ford v. California State Bd. of Equalization, 722 F.2d 496, 497 (9th Cir. 1983), cert. denied, 105 S.Ct. 84 (1984).

A. Subject Matter Jurisdiction

The Republic and the Instituto claim that the district court lacked subject matter jurisdiction over this matter under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-11 (1976) (hereinaft FSIA). We disagree.

The FSIA sets forth a restrictive theory of sovereign immunity. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983). Under the restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." Id.

The legislative history of section 1604 explains that FSIA

> starts from a premise of immunity and then creates exceptions to the general principle. . . . Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state--that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie

> evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 1487, 94th Cong., 2d sess., reprinted in 1978 Code Cong. & Ad. News 6604, 6616. See also Arango, 621 F.2d at 1378 (party claiming immunity under FSIA has burden of demonstrating that exceptions do not apply). In West v. Multibanco Comermex S.A., 807 F.2d 820 (9th Cir. 1987), we stated that "the presumption under FSIA is that actions taken by foreign states or their instrumentalities are sovereign acts and thus protected from the exercise of our jurisdiction, unless one of the enumerated exceptions of FSIA applies." Id. at 824. Thus, where, as here, the plaintiff alleges in his commercial acts, the defendant must establish a prima facie

case that it is a sovereign state and that the plaintiff's claim arise out of a public act. This proof establishes a presumption that the foreign state is protected by immunity. The plaintiff then has the burden of going forward with the evidence by offering proof that one of the FSIA exemptions applies. Once the plaintiff has presented this evidence, the defendant must prove its entitlement to immunity by a preponderance of the evidence. See Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 255-56 (7th Cir. 1983). The FSIA exemption to the defense of foreign sovereign immunity relied upon by the appellees provides in pertinent part that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with commercial activity of the foreign state elsewhere and that

> act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

Appellees have presented evidence that appellants engaged in commercial activities. Appellants have failed to meet their burden of persuasion that this exception does not apply.

The term "commercial activity" applies to an agreement that might be made by a private person, notwithstanding the fact that the goods or services to be procured through the contract are to be used for a public purpose. H.R. Rep. No. 1487, at 16. A public activity is one which only a sovereign state can perform. MOL, Inc. v. Peoples Republic of Bangladesh, 736 F.2d 1326, 1328-29 (9th Cir. 1984), cert. denied, 469 U.S. 1037 (1984) (termination of agreement regarding right to regulate imports and

exports not a commercial activity because only a sovereign could so act).

Obtaining a loan commitment from a lender is a type of activity private persons perform. Thus, the Republic and the Instituto were engaged in a commercial transaction with Meadows and Harris.

A foreign state that engages in commercial activity may still be immune unless the action had a direct effect on a plaintiff. FSIA § 1605(a)(2); Australian Gov't Aircraft Factories v. Lynne, 743 F.2d 672, 674 (9th Cir. 1984).

The evidence must also show that the commercial activity caused that direct effect to occur in the United States. FSIA § 1605(a)(2); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). In Texas Trading, the Second Circuit held

that where the parties agree that money owing on a contract was to be collected in the United States, the failure to pay the plaintiff creates an effect in the United States. 647 F.2d at 312-13. The district court correctly applied Texas Trading to the matter before us. Meadows, 628 F.Supp. at 604. Meadows and Harris reside in the United States. Under the agreement, the commission was to be paid in the United States. As the district court noted, the contract provided that the "'transaction must be made through our bank . . . and through your [plaintiffs'] bank.' (emphasis added)." Id. at 605. Because the effect of the foreign state's commercial activity was in the United States, the record demonstrates that appellants were immune from suit in the district court.

B. Personal Jurisdiction

Appellants argued before the district court that the relevant contacts for personal jurisdiction under the FSIA must be within California, the forum state. The district court rejected this contention, relying on Texas Trading. In Texas Trading, the Second Circuit held that, where service is made under FSIA section 1608, "the relevant area in delineating contacts is the entire United States, not merely [the forum state]." 647 F.2d at 314. We agree with Judge Schwarzer's analysis of this issue, which appears at 628 F.Supp. 599 at 605-08, and adopt it as expressing the view of this Court. The record shows that the Dominican Republic has sufficient contacts in the United States to give the district court personal jurisdiction.

The district court also held that, because the Instituto was an agent of the Republic, in personam jurisdiction existed over the Instituto. 628 F.Supp. at 608. Appellants assert, however, that because the Instituto is an autonomous juridical entity, the Republic cannot be held liable for the Instituto's commercial activity. Appellants claim that the record does not show sufficient contacts in the United States to establish personal jurisdiction over the Instituto.

This contention was raised in the district court for the first time after the hearing on the motion to set aside the default judgment. The district court denied leave to file a supplemental memorandum on the ground that the issue of separate juridical entity is a question of substantive law, not subject matter jurisdiction. Appellants argue

that the issue of juridical separateness goes to subject matter jurisdiction and thus may be raised at any time. This argument is inconsistent with settled legal principles.

In First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 1620 (1983), the Supreme Court held that the question of identity for purposes of attribution of liability among instrumentalities of a foreign state is a matter of substantive law. Substantive law is defined as "[t]he basic law of rights and duties . . . as opposed to procedural law (. . . law of jurisdiction, etc.)." Black's Law Dictionary 1281 (5th ed 1979). Because the Republic and the Instituto failed to demonstrate excusable neglect, they were precluded from relying on the existence of a possible meritorious defense of

separate juridical entity as a basis for setting aside the default judgment.

The judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES V. MEADOWS, and GEORGE HARRIS, Plaintiffs, v. THE DOMINICAN REPUBLIC and INSTITUTO DE AUXILIOS Y VIVIENDAS, Defendants.	No. C-80-4626-WWS MEMORANDUM OF OPINION AND ORDER Filed Feb. 5, 1985

BACKGROUND FACTS

Defendants, the Dominican Republic and one of its executive agencies, Instituto De Auxilios Y Viviendas ("Instituto"), have moved, pursuant to Fed. R. Civ. P. 60(b)(1) and (4), to set aside the default judgment entered against them.

The documents before the Court establish the following facts. By letter of September 6, 1976, to plaintiffs in South Pasadena, California, the Instituto responded to plaintiffs' offer to obtain financing for it, requesting them to obtain a $12,000,000 loan on specified terms. According to plaintiff Meadow's declaration, plaintiffs had previously contacted a lender's agent in London and determined that funds would be available on those terms. The letter provided for a 2% commission payable on disbursement of the loan and specified that the transaction was to be made through a Dominican bank and plantiffs' bank. It is not clear from the letter whether plaintiffs were required to take any action other than performance in order to accept the offer.

In December 1976, the Instituto obtained a commitment for a $12 million loan from Citibank in Santo Domingo on terms similar to those specified in the earlier letter. On February 10, 1977, Citibank transmitted executed loan documents to the Instituto. By undated letter, evidently written shortly thereafter, the Instituto advised plaintiffs that the $12 million loan had been satisfactorily consummated and asked them for terms and conditions for a new loan of $20 million. According to plaintiff Meadows, the director of the Instituto called to thank him for arranging the loan. Later in February 1977, plaintiffs asked Citibank in New York for payment of their commission but were refused. The Instituto also rejected their later requests for payment.

After plaintiffs had made unsuccessful collection efforts in the Dominican Republic, they filed suit in this court on December 19, 1980. Service of process was made on defendants through the United States State Department under 28 U.S.C. § 1609(a)(4) after two unsuccessful attempts to serve by registered mail (defendants having failed to return the receipts). In September 1981, the United States Embassy in the Dominican Republic transmitted the summons and complaint to defendants with a note advising them of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ et seq. and enclosing a copy of it. The note also informed defendants that a failure to respond could result in a default judgment, that any jurisdictional defense must be raised in the court in which the action is pending, and that it is

advisable to consult counsel in the United States. Defendants do not dispute that proper service was made.

When defendants failed to answer or otherwise appear, plaintiffs moved for a default judgment. The judge to whom the case was then assigned dismissed the complaint sua sponte for failing to allege facts sufficient to establish personal jurisdiction over defendants. Plaintiffs' motion for reconsideration was denied as was their subsequent motion to transfer this action to the Southern District of New York.[1/]

1/ Defendants make much of the fact that shortly after filing this action, plaintiffs filed suit in the Southern District of New York solely against the Instituto. The significance they attach to this fact apparently relates to the issue of the Instituto's juridical separateness. In light of the Court's resolution of that issue, infra § C-4, this fact is irrelevant.

Plaintiffs then appealed to the Ninth Circuit, which dismissed the appeal as premature inasmuch as the district court had dismissed only the complaint, not the action, and had therefore not made a final order. The court remanded the case with instructions to "permit appellants to file an amended complaint or to secure the entry of a final judgment."

Plaintiffs then filed a status conference statement (with supporting affidavits) in the district court arguing the jurisdictional issue, and, at a March 30, 1984 status conference, the court instructed plaintiffs to submit an order for a default judgment. The court signed the default judgment on May 30, 1984, and it was entered on June 1, 1984. Plaintiffs have made no attempt to execute on it.

Throughout the pendency of this action, plaintiffs sent defendants copies of all significant pleadings filed by them and defendants acknowledge receiving them. On September 4, 1984, plaintiffs mailed (unsigned) copies of the default judgment in English and Spanish to defendants in conformity with 28 U.S.C. § 1608(a) and (e). Defendants received them on October 15, 1984, but did not return the certified mail receipt or take other action. Plaintiffs attempted another mailing in February 1985, but received no receipt. In the absence of any receipt, plaintiffs in March 1985 again resorted to service through the State Department. After receiving the judgment from the Embassy, defendants retained American counsel and filed this motion on April 10, 1985. A hearing was held on December 6, 1985. On January 7,

1986, defendants applied to the Court for leave to file a supplemental memorandum raising a new issue and on January 9, 1986, for leave to file a further declaration to support their motion.

DISCUSSION

Defendants move for relief from the judgment on two grounds: first, that it is void, Fed. R. Civ. P. 60(b)(4), and, second, that it was the result of excusable neglect, Fed. R. Civ. P. 60(b)(1). For the reasons to be discussed, neither ground is meritorious and the motion will therefore be denied.

I. RELIEF UNDER FED R. CIV. P. 60(b)(4)

Defendants' contention that the judgment is void is based on two arguments: first, that this court lacked subject matter jurisdiction over defendants when it entered judgment.

A motion for relief under Rule 60(b)(4) must be made within a reasonable time. See Bookout v. Beck, 354 F.2d 823, 825 (9th Cir. 1965). The judgment was entered on June 1, 1984; the motion was filed on April 10, 1985. Having been filed within a year from entry of judgment and before plaintiffs took steps to execute on it, the motion will be considered timely.

Unlike motions under other provisions of Rule 60(b), this motion is not addressed to the court's discretion. Either the judgment is void or it is valid. The question of the judgment's validity is therefore one of law. Thos. P. Gonzalez Corp. v. Consejo Nacional de Costa Rica, 614 F.2d 1247, 1256 (9th Cir. 1980).

Moreover, defendants have not waived their jurisdictional defenses by failing

to appear. If the judgment was entered without either subject matter or personal jurisdiction, it is void. Thos. P. Gonzalez, supra, 614 F.2d at 1255.

A. The FSIA

Disposition of this motion requires the Court to consider a number of issues arising under the FSIA. That Act has been said to "present[s] a perculiarly twisted exercise in statutory draftsmanship." See Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring and dissenting). As a result it has produced a body of case law somewhat obscure and confusing and at times seemingly inconsistent. Nevertheless, application of the statutory provisions to the facts of this case

compels the conclusion that this motion is without merit.

By adopting the FSIA, Congress intended to provide nationwide and uniform regulations for the maintenance of suits against foreign states and their entities in the courts of the United States. 28 U.S.C. § 1330(a) grants to the federal courts original jurisdiction over suits against a foreign state where the foreign state is not entitled to immunity under §§ 1605-1607 of the FSIA. Section 1330(b) provides that personal jurisdiction exists as to such claims where service has been made under § 1608. Thus, the court's first inquiry, whether subject matter jurisdiction exists, entails application of the substantive provisions of the FSIA to determine whether an exception to sovereign immunity applies. See Verlinden B.V. v.

Central Bank of Nigeria, 461 U.S. 480, 493 (1983). Subject matter jurisdiction, or competence, cannot be waived; even if the foreign state has not appeared the district court must determine whether immunity is unavailable under the FSIA. Id. at 494 n.20.

Although a literal reading of § 1330(b) suggests that personal jurisdiction exists whenever service of process is made under § 1608 and an exception to sovereign immunity applies, courts have uniformly imported constitutional due process standards into the statute. See Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300, 313-15 (2d Cir. 1981). Thus, the jurisdictional analysis remains two-fold: the Court must determine, first, whether this case falls within a statutory sovereign immunity exception, and second, whether exercise

of personal jurisdiction is constitutionally permissible. See Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

B. Subject Matter Jurisdiction

The FSIA codifies the principle of sovereign immunity but restricts immunity to claims involving a foreign state's public acts; immunity does not extend to claims based on a state's commercial or private conduct. See H.R. Rep. No. 1847, 94th Cong., 2d Sess., reprinted in 1976 U.S.Code Cong. & Admin. News, 6604, 6605 ("House Report"). Section 1605(a)(2) defines three categories of actions arising out of commercial activity to which immunity is denied:

> (i) actions based on a commercial activity carried on in the United States;

(ii) actions based on an act performed in the United States in connection with a commercial activity elsewhere; and (iii) actions based on an act outside the United States in connection with commercial activity elsewhere where the act causes a direct effect in the United States.

The distinctions between these categories are material and result in somewhat different jurisdictional analyses depending on which category is invoked. In this case, jurisdiction is premised only on the third category. Accordingly, it is immaterial whether defendants conduct commercial activities in the United States or whether they performed acts here in connection with a commercial activity elsewhere. Cf. Vencedora, supra, 730 F.2d at 199.

Applying the third category, the first question is whether defendants' efforts to obtain a loan to finance a housing project in the Dominican Republic constituted a commercial activity within the meaning of § 1605(a)(2). Section 1603(d) states that the commercial character of an activity shall be determined by the activity's nature, and not by reference to its purpose. The House Report explains that if the act is one that could be done by a private person, including a contract for goods or services, it will be considered a commercial activity. House Report, supra at 6615. The fact that goods or services are to be used for a public purpose is irrelevant, id. Therefore, the only relevant facts for this analysis are those pertaining to the contract between plaintiffs and defendants.

Plaintiffs allege that defendants contracted for their services to obtain a loan for them. This is an activity routinely engaged in for profit by private individuals and corporations. Whether the purpose of the loan was public or private is immaterial. Nothing before the Court suggests that this transaction was anything but commercial, and defendants have not contended otherwise.

The pivotal issue in the application of the third category is whether the alleged breach of defendants' contractual obligation to pay plaintiffs a commission had the requisite "direct effect in the United States." The breach, i.e., the refusal to pay, as well as the commercial activity from which it arose all took place outside of the United States and

would eventually have received the commission there had it been paid.

The most closely analogous case is Texas Trading, supra, arising out of the Nigerian government's refusal to honor contracts for the purchase by it of cement. The contracts were backed by letters of credit issued by the Central Bank of Nigeria. That bank used as its agent for making payments to sellers in the United States the Morgan Guaranty Trust Company of New York. The court held that the direct effect clause was satisfied because (1) breach of the contract had a direct effect on the sellers who suffered a resulting financial loss, and (2) the loss occurred in the United States because the sellers were American and were to be paid in the United States.

The instant case presents substantially similar facts. Plaintiffs are United States citizens who have suffered financial injury in the United States as a direct result of defendants' alleged breach. It is true that the contract in this case does not call for payment at a specified bank or other location within the United States. It does, however, provide that the "transaction must be made through our bank . . . and through your [plaintiffs'] bank." (Emphasis added) Thus the contract entitles plaintiffs to specify the place of payment; since plaintiffs reside in the United States, defendants could reasonably have expected that payment would be called for at a bank in the United States.

These circumstance satisfy the direct effect test.[2/] To hold otherwise would tend to frustrate the Congressional purpose of providing "access to the courts" to American citizens aggrieved by the commercial acts of a foreign sovereign. See House Report at 6605. See also Velidor v. L/P/G Benghazi, 653 F.2d 812, 820 n.13 (3rd Cir. 1981) (direct effect where foreign seaman brought to the United States without wages due to defendant's breach of employment contract); Note, Effects Jurisdiction Under the Foreign Sovereign Immunities

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2/ Cases under state law defining direct effect for state jurisdictional purposes are not on point. Those cases concern issues of federalism, not international relations with which Congress was concerned in adopting the FSIA. See Texas Trading, 647 F.2d at 312.

Act and the Due Process Clause, 55 N.Y.U.L. Rev. 474, 508-13 (1980).[3/]

C. Personal Jurisdiction

Defendants' attack on the judgment on the ground of lack of personal jurisdiction raises three issues:

1. May defendants be subject to general jurisdiction, as opposed to jurisdiction based on the transaction sued on?

2. If general jurisdiction is an appropriate standard, is the sufficiency of defendants' contacts to be

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3/ Contract cases must be distinguished from pesonal injury cases; an act injuring a person outside the United States does not have a direct effect in the United States even if it also causes incidental loss to others affected, such as family members in the United States. See Australian Gov't Aircraft Factories v. Lynne, 743 F.2d 672, 675 (9th Cir. 1985); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984).

determined with reference to the entire United States?

3. If not, did defendants' contacts within California suffice to satisfy due process requirements?

1. General Jurisdiction

Defendants contend that only contacts in the United States related to the transaction at issue (specific jurisdiction) are relevant in determining whether the exercise of personal jurisdiction is constitutionally permissible. Acceptance of this contention would greatly contract the direct effect exception of the FSIA, since by definition this exception applies only to commercial activity outside of the United States; commercial activity occurring in whole or in part within the United States is covered by the first two categories of exceptions. Thus, as a matter of statutory

interpretation, this contention must be rejected.

Nor does due process require its acceptance. The Supreme Court enunciated the constitutional limits on the exercise of personal jursidiction over foreign corporations in Helicopteros Nacionales de Colombia v. Hall, __ U.S. __, 104 S.Ct. 1868, 1872 (1984), stating:

> Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum state, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) . . . .

Congress intended to subject foreign states engaging in commercial activities within the scope of § 1605(a)(2) to liability to the same extent as private persons. See 28 U.S.C. § 1606; Verlinden, 461 U.S. at 488-89. Thus, the Court's reasoning applies with equal

force here to deny any constitutional bar to the exercise of general jurisdiction over a foreign defendant.[4/] See also Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315-16 (9th Cir. 1985), implicitly adopting the same view. Olsen by Sheldon v. Gov't of Mexico, 729 F.2d 641 (9th Cir. 1984), provides no support for defendants' position. In that action for wrongful death based on state law, the court found sufficient contacts from the transaction at issue to

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4/ The statement that the FSIA collapses subject matter and personal jurisdiction, see McKeel v. Islamic Republic of Iran, 722 F.2d 588, 589-90 n.10 (9th Cir. 1983), does not mandate that more stringent due process reuirements apply under the FSIA. See § A, supra. To the contrary, the due process requirements that courts have read into the statute are only those required by the constitution, and the Supreme Court's ruling in Helicopteros, 104 S.Ct. at 1872, is therefore controlling.

establish specific jurisdiction and therefore found it unnecessary to determine whether general jurisdiction existed. It specifically stated, however, that jurisdiction over a non-resident defendant may be founded on substantial, continuous and systematic contacts with the forum unrelated to the cause of action. Id. at 648. Vencedora, supra, is not in point because that court did not address the personal jurisdiction issue, but held only that where the immunity exception invoked is based on commercial activity carried on in the United States (the first category), commercial activity unrelated to the claim could not support its application. 730 F.2d at 199. Plaintiffs there was a foreign corporation that had suffered harm abroad; since its claim had no substantial nexus with the United States,

it did not and could not invoke the direct effect exception (the third category) at issue here. Harris v. VAO Intertourist, 481 F.Supp. 1056 (E.D.N.Y. 1979), held simply that a plaintiff maintaining a wrongful death action on account of his decedent's death in a hotel fire in Moscow could not show the requisite direct effect within the meaning of the third category. Although the opinion makes no analytical distinction between the subject matter and personal jurisdiction issues, it says no more than the appellate decisions in personal injury actions under the FSIA. See supra, p. 10 n.3. The opinion in Chicago Bridge v. Islamic Repub. of Iran, 506 F.Supp. 981, 989-90 (N.D.Ill. 1980), analyzes personal jurisdiction in terms of the direct effect exception. Its analysis is based in part on the lower

court opinion in Verlinden subsequently reversed by the Supreme Court and on personal injury cases that do not come to grips with the issue of general jurisdiction under the FSIA. None of these cases can be read as lending any support to defendants' position that, either as a matter of statutory interpretation or due process analysis, personal jurisdiction under the FSIA may not be founded on general jurisdiction.

2. Contacts in the United States

Defendants proceed on the assumption that the relevant contacts must be with the forum state, California. But the Supreme Court has noted that jurisdiction under the FSIA is only limited by the requirement of "some form of substantial contact with the United States." Verlinden, 461 U.S. at 490. Defendants rely on cases in which federal

jurisdiction was premised on diversity, see, e.g., Thos. P. Gonzalez, where the court borrowed the state long-arm statute and thus was bound by the same jurisdictional limits as the state courts. By contrast, the FSIA provides its own long-arm statute in § 1330, see House Report at 6612, and § 1608 provides for world-wide service of process.[5/] The court in Texas Trading, noting these factors, ruled that "[s]ince service was made under § 1608, the relevant area in delineating contacts is the entire United States, not merely New York [the forum states]." 647 F.2d at 314.

5/ Thus federalism concerns that animate the caselaw where state long-arm statutes are at issue are not present in caess brought under the FSIA.

The court in Texas Trading reasoned by analogy from cases arising under the federal securities acts. 647 F.2d at 314. It is settled that under federal statutes authorizing nationwide service, "the question becomes whether the party has sufficient contacts with the United States, not any particular state." Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985). The court there stated that "'minimum contacts' with a particular . . . state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries . . ." Id. at 1315, quoting Johnson v. Creative Arts & Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984)

(emphasis added). See also Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Lesco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340-43 (2d Cir. 1972).

Cases brought under the FSIA are analogous, for they too arise under a federal statute. Verlinden, supra, 461 U.S. at 497. Accordingly, it is the federal court, not the state, that exercises jurisdiction over defendants, and the relevant contacts are those with the United States generally.

The criteria for assessing those contacts were stated in Texas Trading as follows:

> . . . the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Id. at 314. See also Schmidt v. Polish People's Republic, 579 F.Supp. 23, 28 (S.D.N.Y. 1984).

Applying those factors to the instant transaction, by negotiating for and obtaining the services of American businessmen through the use of the United States mail and phone systems, and agreeing to pay them in United States dollars at their chosen bank, defendants should have foreseen that litigation in this country might follow in the even that they failed to meet their obligations. See Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (D.C.Cir. 1982); Schmidt, 579 F.Supp. at 28. Moreover, defendants have repeatedly availed themselves of the privileges of American law by seeking recourse in the courts of the United States. See Dominican Republic v. Roach, 280 F.2d 59 (D.C.Cir. 1960)

(contract action); Dominican Republic v. Peguero, 225 F.Supp. 342 (S.D.N.Y. 1963) (action to enjoin defendant from acting as Dominican Consul). Equity dictates that one who seeks relief in the United States courts be required to respond to claims for relief against it in those courts. Cf. First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630-32 (1983) (foreign state seeking relief in United States court may not assert sovereign immunity defense to counterclaim). In addition, plaintiffs in their prior memorandum (Docket 30) enumerated numerous contacts by defendants relating to airline operations and tourist promotion in the United States. See also, Arango v. Guzman Travel Advisors Corp., 621 F.2d 1372, 1378 (5th Cir. 1980) (describing Dominican state airline's commercial activities

in United States). Defendants have neither controverted these facts nor come forward with any reason why litigating in the United States would be a hardship for them. Finally, the United States has a strong interest in providing a forum to citizens such as plaintiffs whose efforts to obtain relief in the courts of the Dominican Republic were effectively blocked by defendants. See Affidavit of Meadows (Docket 21). Accordingly, defendants' contacts in the United States are constitutionally sufficient to sustain the exercise of personal jurisdiction.

3. Contacts with California

Even if the relevant contacts were confined to California, defendants' contacts must be found to be sufficiently substantial, continuous and systematic, (see Data Disc, Inc. v. Systems Tech.

Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977), to establish that they have purposefully availed themselves of the privilege of conducting activities within this state. Hanson v. Denckla, 357 U.S. 235, 253 (1958). The Court takes judicial notice of the fact (not denied by defendants) that the Dominican Republic has maintained consulates in San Francisco and Los Angeles for some fifty years. This activity by defendant Dominican Republic is chargeable to its agency, defendant Instituto, since a government maintaining a consulate acts on behalf and for the benefit of all of its constituent parts. See Texas Trading, supra, 647 F.2d at 314. Defendants thus have maintained a substantial and continuous presence in California, availing themselves of the privilege of conducting business here and invoking the

benefits of California law (even apart from their activities in connection with the instant transaction).

None of the cases cited by defendants involve a defendant present in the forum on such a continuous and substantial basis. See, e.g., Paccar Intern., Inc. v. Comm'l Bank of Kuwait, 757 F.2d 1058 (9th Cir. 1985) (specific jurisdiction, lack of general jurisdiction conceded); Thos. P. Gonzalez, supra, at 1249 ("During this period, the Consejo had neither an office, a place of business, property nor an agent in California."). Accordingly, the exercise of personal jurisdiction over defendants in this case is constitutionally permissible under either geographical standard.

4. Instituto as a Separate Entity

In their supplemental memorandum filed in January 1986 following the hearing, defendants contend for the first time that the Instituto is a separate jurisdical entity under Dominican law, and that therefore its acts are not attributable to the Republic. If that were so, the latter would not be properly joined as a defendant and its contacts within the United States would afford no basis for personal jurisdiction over the Instituto, which presumably has none.

For the issue of the Instituto's separateness to be properly before the Court at this stage, it must go directly to the validity of the judgment, i.e., to subject matter or personal jurisdiction. The Supreme Court squarely has held that the FSIA does not "affect the substantive law determining the liability of a

foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." First Nat. City Bank, supra, 462 U.S. at 620. In that case, the Court held that the FSIA did not control whether Cuban assets could be offset against the claims of an instrumentality established and party owned by the Cuban government. It looked instead to a variety of sources of substantive law.

First Nat. City Bank treats the issue of juridical separateness as one of substantive law, not subject matter jurisdiction. It is therefore not open for consideration at this stage, for an error of law is not a ground for vacating a default judgment as void. Jones v. Giles, 741 F.2d 245, 248 (9th Cir. 1984). A fortiori the issue is not open for consideration in determining whether

personal jurisdiction existed. Accordingly, defendants' post-hearing request for leave to file supplemental materials will be denied.

II. RELIEF UNDER FED. R. CIV. P. 60(b)(1)

Defendants also seek relief from the judgment under Rule 60(b)(1) on the ground of "excusable neglect." The rule requires that such a motion "shall be made within a reasonable time, and . . . not more than one year after the judgment . . . was entered or taken." This motion was filed nearly eleven months later. Because plaintiffs did not attempt to execute on the judgment, however, defendants had no compelling incentive to attack the judgment sooner. Accordingly, defendants' Rule 60(b)(1) motion will be considered timely.

A motion under Rule 60(b)(1) is properly denied if plaintiffs will be

prejudiced, or if the culpable conduct of defendants led to the default, or if defendant has not demonstrated a meritorious defense. Pena v. Seguro La Comercial, 770 F.2d 811 (9th Cir. 1985). All three grounds exist here.

A. Defendants' Culpable Conduct

Defendants contend that the judgment should be vacated for excusable neglect, based on reliance on legal advice. The so-called legal advice consists of what defendants describe as an opinion solicited from an "Advisory/Consulting Commission" by the then sub-secretary of the Dominican Republic's Foreign Affairs office. No evidence of the contents of that opinion is before the Court. Defendants offer only the conclusory statement that the opinion was "that the Dominican Republic should not appear before the American tribunals nor be

represented before such courts." Defendants have submitted a number of vague, conclusory and somewhat contradictory declarations and documents but none establish that any reasoned legal advice, based upon an examination of the facts and the law, was given by a competent person and relied upon by a responsible decision maker.

Moreover, allegedly erroneous legal advice is not sufficient to establish excusable neglect where the party is (a) fully informed of the relevant legal considerations, and (b) sufficiently sophisticated and experienced to protect its interests. See Wilson v. Moore & Associates, Inc., 564 F.2d 366, 368 (9th Cir. 1977); United States v. Cirami, 535 F.2d 736 (2d Cir. 1976); Cline v. Hoogland, 518 F.2d 776 (8th Cir. 1975);

Patapoff v. Vollstedt's, Inc., 267 F.2d 863, 865 (9th Cir. 1959).

Defendants were fully informed of the relevant legal considerations by the transmittal note from the State Department, which told them explicitly that failure to appear in response to process could lead to a default judgment and that they should consult American counsel.

Defendants moreover are experienced and sophisticated litigants in American courts. See Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980); Dominican Republic v. Roach, 280 F.2d 59 (D.C.Cir. 1960); Dominican Republic v. Peguero, 225 F.Supp. 342 (D.N.Y. 1963). Indeed, in Arango, the court of appeals decided on July 25, 1980, that the national airline of the Dominican Republic was subject to suit in the United States under the FSIA. It is

difficult to imagine how defendants could have received more authoritative advice about the applicability of the FSIA than the opinion of the court of appeals rendered just six months before this action was filed.

B. Prejudice to Plaintiffs

The transactions on which plaintiffs' claim is based occurred nearly ten years ago. The action was filed five years ago. One witness, Peter Culbertson, has died. One of the plaintiffs, Charles Meadows, is seriously ill and unable to testify. Another witness, Antonia Alma, has disappeared. Defendants' effort to shift the blame for the lapses of time on plaintiffs comes with ill grace considering their adamant and persistent refusals to respond. Having placed substantial obstacles in plaintiffs' way, they are in

no position now to deny the prejudicial consequences of their conduct.

C. Meritorious Defense

Although it is not necessary in view of the foregoing findings, the Court has considered the merits of defendants' position. The documents before the Court are sufficient to establish a written promise to pay plaintiffs a commission if they procured a loan for the Instituto. Whether a binding contract was formed and whether plaintiffs performed under that contract are questions that would have been resolved at trial. They cannot be resolved on the record before the Court. On that record it cannot be said that defendants have meritorious defenses on the merits of the claim. In any event, as explained in §§ B and C, they are not entitled to raise them now. That they

have no jurisdictional defense has heretofore been established.

Conclusion

For the reasons stated, the motion is denied.

IT IS SO ORDERED.

DATED: February 5, 1986

WILLIAM W. SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES V. MEADOWS, and GEORGE HARRIS, Plaintiffs, v. THE DOMINICAN REPUBLIC and INSTITUTO DE AUXILIOS Y VIVIENDAS, Defendants.	No. C-80-4626-WWS ORDER Filed Feb. 25, 1986

Defendants' motion for reconsideration is denied.

IT IS SO ORDERED.

DATED: February 24, 1986

WILLIAM W SCHWARZER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES V. MEADOWS, GEORGE HARRIS, Plaintiffs-Appellees/ Cross-Appellants, v. THE DOMINICAN REPUBLIC; and INSTITUTO, DE AUXILIOS Y. VIVIENDAS, Defendants-Appellants/ Cross-Appellees.	No. 86-1785 and 86-1843 D.C. NO. CV 80-4626-WWS ORDER Filed July 30, 1987 U.S. Court of Appeals

Appeal from the
United States District Court
for the Northern District of California
William W. Schwarzer,
District Judge, Presiding

Argued and submitted
January 16, 1987
San Francisco, California

Before: HUG, and ALARCON, Circuit Judges, and STEPHENS*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Alarcon

have voted to reject the suggestion for a rehearing en banc, Judge Stephens would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b)

The Petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied

upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter --

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity -

1. which is a separate legal person, corporate or otherwise, and

2. which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

3. Which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of

the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property

situated in the United States are in issue; or

(5) not otherwise emcompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss to property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign sate while acting within the scope of his office or employment; except this paragraph shall not apply to -

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation,

deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That --

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing

the suit -- unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest. Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns

the vessel or cargo involved: Provided, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection(b)(1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the

law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by persons for whose benefit the action was bought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim --

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been

brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counter claim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the

official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be

made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the

summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence

satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication,

notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used

for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if--

(1) the agency or instrumentality

has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the

giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be

entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exceptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be

immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver: or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

Rule 60(b)

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs or coram nobis, coram vobis, audita querela, and bills of review and bills in the nature

of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.